Sri Datai Mining Sdn Bhd v Gelinggas ak James Watt & Ors

HIGH COURT (SIBU) — CIVIL APPEAL NO SBW-11B-2–5 OF 2023
WONG SIONG TUNG J
13 DECEMBER 2023

Labour Law — Employment — Termination — Award — Appeal against award — Senior Assistant Director of Labour awarded payments for overtime, termination and layoff benefits to respondents — Appeal by employer — Whether respondents were 'employee' according to Labour Ordinance (Sarawak Cap 76) ('SLO') — Whether respondents engaged in 'manual labour' — Whether respondents eligible for overtime pay — Whether respondents' working hours exceeded statutory limit specified by SLO for overtime pay — Whether respondents entitled to termination and layoff benefits — Whether termination of respondents' employment by employer was justified due to misconducts by respondents — Labour Ordinance (Sarawak Cap 76) ss 2, 8A, 14(1), 105(6), 105A(1), 108 & 111(1) — Labour (Termination and Lay-Off Benefits) (Sarawak) Rules 2008 rr 4(1)(b) & 6(1)

The respondents were the former employees of the appellant, a company carrying out coal mining operations in Mukah, Sarawak. Via the appellant's letter dated 30 August 2022, the respondents were informed that their employment contracts were not renewed and thus terminated with effect on 1 October 2022. Aggrieved, the respondents referred the matter to the labour department. The Director of Labour then carried out an inquiry pursuant to s 8A of the Labour Ordinance (Sarawak Cap 76) ('the SLO') and following such inquiry, the Senior Assistant Director of Labour had ordered the appellant to pay the respondents for overtime, termination as well as layoff benefits ('the award'). The appellant then filed the present appeal against such award. The appellant submitted that: (a) the respondents did not fall within the definition of 'employee' according to the SLO, as they were not engaged in 'manual labour' rendering the SLO inapplicable to their case; (b) the respondents were not eligible for overtime pay since their working hours did not exceed the statutory limit specified by the SLO for overtime pay; and (c) the respondents were not entitled to termination and layoff benefits, as they did not meet the criteria to be classified as 'employees' under the SLO, and that their employment termination by the appellant was justified due to misconducts on their part.

Held, dismissing the appeal with costs of RM2,000 and RM800 to the first respondent and the second respondent respectively subject to and with allocatur fees and no order as to costs to the third respondent who had not attended to the appeal:

(1) The first and second respondents were employed by the appellant to operate Articulated Dump Trucks while the third respondent was tasked with operating excavator. Operating these machines undoubtedly necessitated knowledge, understanding, and skill in manipulating the control systems of these machineries, involving continuous manual engagement of hands and legs. The knowledge, understanding, and skill or expertise in handling the control systems of these machineries, while crucial, remained secondary to the core aspect of continuous manual labour — using hands and legs to operate these machineries. This manual dexterity did not primarily rely on highly scientific knowledge but emphasises practical skill and physical engagement. There was no innovation or creation of the operators of their own by using these machineries. Applying the tests or criteria established in the decided cases, the court found that the respondents engaged in 'manual labour' according to the definition in s 2(a) of the Schedule to the SLO, despite the skill required for operating or driving these machineries in their employment. That being the case, the Assistant Director of Labour had not committed any legal or factual error in this regard (see paras 12 & 49–52).

(2) Although s 105A(1) of the SLO allowed for more than 48 hours in a week for shiftwork but the average over any three-week period should not exceed 48 hours per week. However, in the present case, the respondents were engaged in working hours average 66 hours per week (11 hours per day). This exceeded the limit set by the section. Based on ss 105(6) and 2 of the SLO, the respondents had indeed been working overtime for the excess of three hours per day over the period of every three weeks, the normal working hours as prescribed by s 105A(1) being eight hours per day (see paras 60 & 63–67).

(3) Pursuant to s 2 of the SLO, wages of the respondents that the appellant agreed to pay were inclusive of all their entitlement to the paid one off day a week, 'Field Break' of 14 days plus two days (16 days) ('the off days') but excluding all those allowances and items excluded by the definition of 'wages' under s 2 of the SLO. Further, based on s 111(1) of the SLO, the overtime pay owed to the respondents constituted wages that must be actually paid by the appellant in legal tender and not to be paid or asserted to have been paid via the off days as contended by the appellant. These off days were already factored into and regarded as part of wages under the category of 'paid holidays, excluding Sundays or other rest days' under s 108 of the SLO. Therefore, if the respondents were required or obligated to work during the off days, they must be additionally compensated and paid for the work, as they had already earned entitlement by their wages. For the above reasons, despite the

respondents being provided with the off days, these allowances did not negate their entitlement to and from receiving overtime pay (see paras 73–77).

(4) To entitle the appellant to terminate the employment contracts of the respondents on the grounds of their misconduct inconsistent with the fulfillment of the express or implied conditions of his service as asserted by the appellant, s 14(1) of the SLO conferred upon the respondents a statutory right to undergo a 'due inquiry' conducted by the appellant before any dismissal. The requirement of a 'due inquiry' included the right of the respondents as employees, not only to a fair hearing and an opportunity to answer the charges brought against them, but also the right to make representations in mitigation of any punishments that were proposed by the domestic inquiry tribunal. There was no 'due inquiry' held in the present case, as such, the appellant was liable to pay the respondents the termination benefits under s 14(1) of the SLO and the Senior Assistant Director of Labour therefore did not err in law or fact in granting the respondents the termination benefits pursuant to r 4(1)(b) of the Labour (Termination and Lay-Off Benefits) (Sarawak) Rules 2008 and calculated according to r 6(1) thereof (see paras 88–91).

(5) Examining the sequence of events involving all three respondents, the court found that the performance and disciplinary issues identified by the appellant as grounds for terminating their employment mainly revolved around absenteeism as a form of misconduct. Notably, the appellant had already punished and penalised all three respondents by suspending them from work without pay. Consequently, subjecting them to termination of their employment contracts for the same misconducts again without affording them an opportunity to be heard and defend themselves would constitute an unfair and double punishment (see paras 121–122).

[Bahasa Malaysia summary

Responden-responden adalah bekas pekerja-pekerja perayu, sebuah syarikat yang menjalankan operasi perlombongan arang batu di Mukah, Sarawak. Melalui surat perayu bertarikh 30 Ogos 2022, responden-responden dimaklumkan bahawa kontrak pekerjaan mereka tidak diperbaharui dan dengan itu ditamatkan berkuat kuasa pada 1 Oktober 2022. Terkilan, responden-responden merujuk perkara tersebut kepada jabatan buruh. Pengarah Buruh kemudiannya menjalankan siasatan menurut s 8A Ordinan Buruh (Sarawak Cap 76) ('SLO') dan berikutan siasatan tersebut, Penolong Kanan Pengarah Buruh telah mengarahkan perayu membayar responden-responden untuk kerja lebih masa, penamatan serta faedah pemberhentian ('award tersebut'). Perayu kemudiannya memfailkan rayuan semasa terhadap award tersebut. Perayu berhujah bahawa: (a) responden-responden tidak termasuk dalam takrifan 'pekerja' mengikut SLO, kerana mereka tidak terlibat dalam 'manual labour' yang menjadikan

SLO tidak terpakai untuk kes mereka; (b) responden-respoden tidak layak menerima gaji lebih masa kerana waktu bekerja mereka tidak melebihi had berkanun yang ditetapkan oleh SLO untuk gaji lebih masa; dan (c) responden-responden tidak berhak mendapat faedah penamatan dan pemberhentian, kerana mereka tidak memenuhi kriteria untuk diklasifikasikan sebagai 'pekerja' di bawah SLO, dan bahawa penamatan pekerjaan mereka oleh perayu adalah wajar disebabkan oleh salah laku yang mereka lakukan.

Diputuskan, menolak rayuan dengan kos sebanyak RM2,000 dan RM800 masing-masing kepada responden pertama dan responden kedua tertakluk kepada dan dengan bayaran alokatur dan tiada perintah berkenaan kos kepada responden ketiga yang tidak menghadiri rayuan:

(1) Responden pertama dan responden kedua telah diambil bekerja oleh perayu untuk mengendalikan Trak Pembuangan Artikulasi manakala responden ketiga ditugaskan untuk mengendalikan mesin jengkaut. Pengendalian jentera-jentera ini sudah pasti memerlukan pengetahuan, pemahaman, dan kemahiran dalam memanipulasi sistem kawalan jentera-jentera ini, yang melibatkan penglibatan tangan dan kaki secara manual secara berterusan. Pengetahuan, kefahaman, dan kemahiran atau kepakaran dalam mengendalikan sistem kawalan jentera-jentera ini, walaupun penting, adalah sekunder kepada aspek teras buruh manual berterusan — iaitu menggunakan tangan dan kaki untuk mengendalikan jentera-jentera ini. Ketangkasan manual ini tidak bergantung pada pengetahuan yang sangat saintifik tetapi menekankan kemahiran praktikal dan penglibatan fizikal. Tiada inovasi atau ciptaan pengendali itu sendiri dengan menggunakan jentera-jentera ini. Menggunakan ujian atau kriteria yang ditetapkan dalam kes-kes yang diputuskan, mahkamah mendapati bahawa responden-responden terlibat dalam 'manual labour' mengikut takrifan dalam s 2(a) Jadual kepada SLO, walaupun kemahiran diperlukan untuk mengendalikan atau memandu jentera-jentera ini dalam pekerjaan mereka. Oleh itu, Penolong Pengarah Buruh tidak melakukan apa-apa kekhilafan undang-undang atau fakta dalam hal ini (lihat perenggan 12 & 49–52).

(2) Walaupun s 105A(1) SLO membenarkan lebih daripada 48 jam dalam seminggu untuk kerja syif tetapi purata dalam mana-mana tempoh tiga minggu tidak boleh melebihi 48 jam seminggu. Walau bagaimanapun, dalam kes ini, responden-responden terlibat dalam waktu bekerja dengan purata 66 jam seminggu (11 jam sehari). Ini melebihi had yang ditetapkan oleh seksyen tersebut. Berdasarkan ss 105(6) dan 2 SLO, responden-responden sememangnya telah bekerja lebih masa melebihi tiga jam sehari dalam tempoh setiap tiga minggu, waktu bekerja biasa seperti yang ditetapkan oleh s 105A(1) ialah lapan jam sehari (lihat perenggan 60 & 63–67).

(3) Menurut s 2 SLO, upah responden-responden yang dipersetujui oleh perayu untuk dibayar adalah termasuk semua kelayakan mereka untuk mendapat bayaran satu hari cuti seminggu, 'Field Break' selama 14 hari ditambah dua hari (16 hari) ('hari-hari cuti tersebut') tetapi tidak termasuk semua elaun dan item yang dikecualikan oleh takrifan 'upah' di bawah s 2 SLO. Selanjutnya, berdasarkan s 111(1) SLO, gaji lebih masa yang terhutang kepada responden-responden merupakan upah yang mesti dibayar oleh perayu secara sah dan bukan dibayar atau menegaskan telah dibayar melalui hari-hari cuti tersebut seperti yang dihujahkan oleh perayu. Hari-hari cuti ini telah diambil kira dan dianggap sebagai sebahagian daripada upah di bawah kategori 'paid holidays, excluding Sundays or other rest days' di bawah s 108 SLO. Oleh itu, jika responden-responden dikehendaki atau diwajibkan untuk bekerja pada hari-hari cuti tersebut, mereka mesti diberi pampasan tambahan dan dibayar untuk kerja tersebut, kerana mereka telah memperolehi kelayakan melalui upah mereka. Atas sebab-sebab di atas, walaupun responden-responden diberikan hari-hari cuti tersebut, pemberian ini tidak menafikan kelayakan mereka kepada dan daripada menerima gaji lebih masa (lihat perenggan 73–77).

(4) Bagi membolehkan perayu untuk menamatkan kontrak pekerjaan responden-responden atas alasan salah laku mereka yang bertentangan dengan pemenuhan syarat nyata atau tersirat perkhidmatan mereka seperti yang ditegaskan oleh perayu, s 14(1) SLO memberikan hak berkanun kepada responden-responden untuk menjalani 'penyiasatan wajar' yang dijalankan oleh perayu sebelum apa-apa pemecatan dibuat. Keperluan 'penyiasatan wajar' termasuk hak responden-responden sebagai pekerja, bukan sahaja untuk pendengaran yang adil dan peluang untuk menjawab pertuduhan yang dikenakan terhadap mereka, tetapi juga hak untuk membuat representasi dalam mengurangkan apa-apa hukuman yang dicadangkan oleh tribunal siasatan domestik. Tiada 'penyiasatan wajar' diadakan dalam kes ini, oleh itu, perayu bertanggungjawab untuk membayar responden-responden faedah penamatan kerja di bawah s 14(1) SLO dan Penolong Pengarah Kanan Buruh oleh itu tidak terkhilaf dari segi undang-undang atau fakta dalam memberikan responden-responden faedah penamatan kerja menurut k 4(1)(b) Kaedah-Kaedah Buruh (Faedah Penamatan dan Pemberhentian) (Sarawak) 2008 dan dikira mengikut k 6(1) (lihat perenggan 88–91).

(5) Meneliti rentetan peristiwa yang melibatkan ketiga-tiga responden, mahkamah mendapati bahawa isu-isu prestasi dan tatatertib yang dikenal pasti oleh perayu sebagai alasan untuk menamatkan pekerjaan mereka terutamanya berkisar tentang ketidakhadiran sebagai satu bentuk salah laku. Apa yang jelas, perayu telah pun menghukum ketiga-tiga responden dengan menggantung mereka daripada kerja tanpa gaji. Akibatnya, menghukum mereka dengan penamatan kontrak pekerjaan

mereka atas kesalahan yang sama sekali lagi tanpa memberi mereka peluang untuk didengar dan membela diri adalah terjumlah kepada hukuman yang tidak adil dan berganda (lihat perenggan 121–122).]

Cases referred to

Abdul Razab bin Yahaya lwn Champsurf Sdn Bhd [2023] 7 MLJ 891, HC (refd)
Bond Electrical (KL) Sdn Bhd v Abu Bakar bin Chik & lain-lain [2002] 4 MLJ 139, HC (refd)
Chareon Pokphand Jaya Farm (M) Sdn Bhd v Chung Lin [2005] MLJU 680; [2006] 1 CLJ 784, HC (refd)
Colgate Palmolive Sdn Bhd v Cheong Foo Weng [2001] MLJU 765, HC (refd)
Dreamland Corp (M) Sdn Bhd v Chong Chin Sooi & Anor [1988] 1 MLJ 111, SC (refd)
Federal Power Sdn Bhd v Vengataselam Chellappan [2019] 1 LNS(O) 14 [CA], CA (refd)
J & F Stone Lighting & Radio Ltd v Haygarth [1968] AC 157, HL (refd)
Leighton Contractors (M) Sdn Bhd v Gnanapragasam a/l Arukiam & Ors [2016] 11 MLJ 559, HC (refd)
Md Zaini bin Abdullah & Ors v Panasonic Automotive Systems [2022] 10 MLJ 23; [2022] 3 ILR 1; [2022] 5 CLJ 727, HC (refd)
Oliver Hennedige v Public Prosecutor [1986] 2 MLJ 81 (refd)
Said Dharmalingam bin Abdullah (formerly known as Dharmalingam a/l Ranganathan) v Malayan Breweries (Malaya) Sdn Bhd [1997] 1 MLJ 352, SC (refd)
Syed Ibrahim bin Syed Mohd & Ors v Esso Production Malaysia Incorporated [2004] 2 MLJ 49; [2014] MLRHU 1458, CA (refd)
Tyrrell, Re; Gardner, Re; Mascher, Re [1938] 1 All ER 20, HL (refd)
Wong Yuen Hock v Sykt Hong Leong Assurance Sdn Bhd and another appeal [1995] 2 MLJ 753, FC (not folld)
Yeo Hiap Seng Trading Sdn Bhd v Lim Lee Choon [2004] 1 CLJ 634, HC (refd)
Yong & Son Construction Sdn Bhd v Thian Kim Fatt [2017] MLJU 192, HC (refd)

Legislation referred to

Employment Act 1955 s 14(1)
Factories Act 1973 s 9(1)
Industrial Relations Act 1967 s 20(3)
Labour (Termination and Lay-Off Benefits) (Sarawak) Rules 2008 rr 3(1) 4(1) (1)(b) 6 6(1)
Labour Ordinance (Cap 76) ss 2, 2(a), 8A, 8A(1), 14(1), 105(6), 105A, 105A(1), 108, 111(1), Schedule
Rules of Court 2012 O 55A r 1

Gordon Tang (with Wong King Yii) (Tang Advocates) for the appellant.
Henry Ting (Bong, Tieh, Tiong & Kiu Advocates) for the first respondent.

The second respondent appeared in person (self-represented).
The third respondent absent (not represented).

Wong Siong Tung J:

INTRODUCTION

[1] This is an appeal brought by the appellant under s 8A of the Labour Ordinance (Sarawak Cap 76) ('the SLO') in accordance with O 55A r 1 of the Rules of Court 2012.

[2] The appeal is against the decisions of the Senior Assistant Director of Labour related to the awards made in favour of the respondents, who were the former employees of the appellant.

BRIEF BACKGROUND FACTS

[3] The three respondents were all formerly employed by the appellant, a company carrying coal mining operations in Mukah, Sarawak.

[4] The three respondents were informed by the appellant by the appellant's letter dated 30 August 2022 that their employment contracts with the appellant were not renewed and thus terminated with effect on 1 October 2022.

[5] Not satisfied with the termination of their employment contracts, on 4 October 2022, the respondents lodged their complaints with the Labour Department against the appellant claiming for various sums including overtime payment, termination and layoff benefits.

[6] Following an inquiry on 23 November 2022 held by the Director of Labour under s 8A(1) of the Labour Ordinance (Sarawak Cap 76) ('the SLO'), on 18 April 2023, the Senior Assistant Director of Labour ordered the appellant to pay the respondents as follows:

(a) Gelinggas ak James Watt:
Overtime: RM12,454.80
Termination and lay-off benefits: RM4,333.47
Total: RM16,788.27

(b) Jacky ak Dunggat:
Overtime: RM12,804.00
Termination and lay-off benefits: RM1,326.57
Total: RM14,130.57

(c) Nelson Kudan ak Budin:
Overtime: RM14,531.16
Termination and lay-off benefits: RM5,265.86
Total: RM19,617.02

[7] The Senior Assistant Director of Labour also ordered the appellant to paid the awarded sums to the respondents within 30 days and failing which, interest at the rate of 8%pa shall be chargeable commencing on 18 May 2023 until full payment.

THE APPELLANT'S GROUNDS OF APPEAL

[8] The grounds of the appellant's appeal can be summarised as follows:

(a) that the respondents do not fall within the definition of 'employee' according to SLO, as they were not engaged in 'manual labour' rendering the SLO inapplicable to their case;

(b) that the respondents are not eligible for overtime pay since their working hours did not exceed the statutory limit specified by the SLO for overtime pay; and

(c) that the respondents are not entitled to termination and layoff benefits, as they do not meet the criteria to be classified as 'employees' under the SLO, and that their employment termination by the appellant was justified due to misconducts on their part.

WHETHER THE RESPONDENTS WERE 'EMPLOYEES' WITHIN THE DEFINITION

[9] If the respondents do not fall within the definition as 'employee' under SLO, any right to security of tenure guaranteed by the SLO and provisions thereunder would not apply to the respondents.

[10] So far as applicable, s 2 of the SLO defines 'employee' to mean any person or class of persons included in any category in the Schedule of SLO to the extent specified therein.

[11] Schedule to SLO categorised the person or class of persons to whom the provisions of the SLO so far as relevant, are applicable are:

> Section 1: Any person, irrespective of his occupation, who has entered into a contract of service with an employer under which such person's wages *do not exceed two thousand five hundred ringgit a month.*
>
> Section 2: Any person who, *irrespective of the amount of wages he earns in a month*, has entered into a contract of service with an employer in pursuance of which —

(a) he is engaged in *manual labour* including such labour as an artisan or apprentice: A

Provided that *where a person is employed by one employer partly in manual labour and partly in some other capacity, such person shall not be deemed to be performing manual labour unless the time during which he is required to perform manual labour in any one wage period exceeds one half of the total time during which he is required to work in such wage period*; B

(b) ... (Emphasis added.)

[12] The first and second respondents were employed by the appellant to operate articulated dump trucks ('ADT'), while the third respondent was tasked with operating a 349-Excavator at the appellant's mining site. C

[13] ADT specialised off-road vehicle designed for the transportation of materials, particularly in rugged and challenging terrains such as construction sites, mining areas, and quarries whereas 349-Excavators are heavy construction equipment used for digging and earthmoving purposes. D

[14] Based on their final salaries as per the appellant's payment records, each of the respondents was earning a sum exceeding RM2,500. E

[15] Consequently, this places each of the respondents outside the scope of the definition of an 'employee' under s 2 of the Schedule to SLO for application of the provisions under section SLO.

F

[16] However, the analysis does not end here. The pivotal question is whether, despite their remuneration levels, the respondents were nonetheless still involved in 'manual labour' as defined under s 2(a) of the Schedule to SLO.

[17] The learned counsel for the appellant submitted that the operations of these machineries requires a specific skillset acquired through training and experience and the respondents were required to undergo special training. G

[18] He referred to the job scope of the first and second respondents as the operators of ADT of which they are required to: H

(a) safely and productively operate the caterpillar articulated dump truck;

(b) moving overburden (including pea) to and from designated areas;

(c) pre-shift inspection of the dump truck, which includes checking the oil, fuel, auto greasing, and water levels, as well as the lights and tyres; I

(d) reporting any accidents, injuries, or mechanical malfunctions to management as soon as possible; and

(e) pay close attention to the cluster display and coloured module panel display and keep an accurate operator log with records of any anomalies for the maintenance team to investigate.

[19] The learned counsel for the appellant also referred to the job scope of the third respondent as the operator of the 349-Excavator, which required the third respondent to:

(a) operate the Caterpillar 349 excavator safely and productively;

(b) ensuring proper material loading onto the dump truck and/or coal hauling trucks;

(c) before each shift, inspect the excavator, checking the oil, fuel, auto greasing and water levels;

(d) reporting any accidents, injuries, or mechanical malfunctions to management as soon as possible; and

(e) pay close attention to the display panel group and keep an accurate operator log with records of any anomalies to be investigated by the maintenance team.

[20] The learned counsel for the appellant relied on the decisions of the High Court in the case of *Colgate Palmolive Sdn Bhd v Cheong Foo Weng* [2001] MLJU 765 and in the case of *Md Zaini bin Abdullah & Ors v Panasonic Automotive Systems* [2022] 10 MLJ 23; [2022] 3 ILR 1; [2022] 5 CLJ 727. He contended that the respondents were not engaged in 'manual labour' and that they were specialised employees.

[21] In *Colgate Palmolive Sdn Bhd v Cheong Foo Weng* [2001] MLJU 765, the respondents were engaged as senior craftsman, electrical technician, instrument technician, waste water technician and boiler attendant.

[22] In that case, the respondent engaged as senior craftsman has to oversees machine chain maintenance, making decisions on part replacements and troubleshooting for seamless operations. He mentored new craftsmen, providing advice and training. His responsibilities also include purchasing spare parts and making emergency orders for small items. While the role is hands-on, the key focus is on utilising the senior craftsman's technical expertise and problem-solving skills to ensure seamless machinery functionality.

[23] The respondent with chargeman's certificate who was engaged as electrical technician, assumed the responsibility of troubleshooting electrical problems by methodically analysing issues and applying his expertise to execute repairs. In the case of a malfunctioning motor, he conducted a systematic

examination of the starter, supply, fuses, and the motor itself, relying on his extensive knowledge. Occasionally, he consulted diagrams, boilers, or supervisors for additional guidance. During the grave shift, he took control, handling crucial responsibilities in a high-voltage area and substation, where only qualified individuals are allowed access due to the risks associated with working with electricity.

[24] The respondent engaged as instrument technician in that case was responsible also for troubleshooting, identifying and analysing problems independently, applying his expertise to carry out repairs and in making decisions to resolve issues working autonomously. For new equipment, he has to undergo training through briefings to understand and maintain the systems effectively. At his workplace, he has an instrument room with a designated desk. Drawing on his experience, he actively contributed to discussions, offering recommendations and suggestions.

[25] The respondent engaged by the appellant as waste water technician in that case, was responsible for various tasks, including collecting raw water samples, conducting analyses, and inputting results into a computer. He generated daily and weekly reports and managed delivery and purchase orders for chemicals. In case of shortages, he communicated with suppliers under the guidance of an engineer. He has to maintain a daily log book, recording breakdowns and necessary maintenance. He has to perform lab works which involves incubating samples, taking readings after incubation, and calculating differences as per a given formula. During the grave shift, when the engineer was absent, he took charge. Although not directly involved in training worker, he assisted and provided instructions.

[26] Finally, the role of respondent engaged by the appellant as boiler attendant in that case demanded a high level of concentration and specialised skills, making it exclusive to qualified boilermen. He worked independently without a supervisory role in any shift. His task also involved suggesting and recommending actions to the company, which are functions unique to a boilerman and not performable by others. These responsibilities are specific to qualified boilermen due to the specialised nature of the job.

[27] In the premises, in that case, the court found that the substantial/dominant purpose of the respondents' work was non-manual work as it required 'the labour of the brain and intelligence' as well as their acquired skill, knowledge or experience. The court held the while their hands are involved in daily tasks, this physical aspect does not overshadow the primary purpose of their employment, which revolves around their mental faculties and diagnostic abilities.

[28] In the case of *Md Zaini bin Abdullah & Ors v Panasonic Automotive Systems* [2022] 10 MLJ 23; [2022] 3 ILR 1; [2022] 5 CLJ 727, the court held that the key determinant of whether a person is 'engaged in manual labour' lies in identifying the dominant or primary effort involved in the work, rather than the incidental or ancillary efforts.

[29] The court found in that case, that the appellants' primary effort was mental, with physical exertion being secondary and supportive. Their works heavily relied on intellectual processes, skills acquired through training, and experience. The court concluded that the Labour Officer's decision that the appellants were not engaged in manual labour was reasonable, as the dominant element of the appellants' work was the application of their minds and intellect, with physical movements being a consequential aspect.

[30] In *Oliver Hennedige v Public Prosecutor* [1986] 2 MLJ 81, the appellant was a dental surgeon. He employed two dental technicians to manufacture dentures on a premises. The appellant was convicted in the lower court of having used the premises as an unregistered factory contrary to and punishable under s 9(1) of the Factories Act 1973. He was sentenced to a fine of $1000 or, in default, one month's imprisonment. Not satisfied with the decision, he appealed to the High Court.

[31] The question on appeal is whether the two dental technicians were considered as being 'employed in manual labour' as defined by the Factories Act 1973. The High Court examined the detailed work process of these technicians, which involved the study of jaw shape, ridge, and palate, adjustments, setting false teeth using an articulator, and finalising dentures through polishing, grinding, and trimming. They were involved in the non-clinical aspects of prosthetic dentistry. They have to carry out their works from the bite impressions of the dental patients taken by the dental surgeon and to follow the instructions of the dental surgeon. In the circumstances, the court held that despite their manual dexterity, the two technicians had not created any full or partial dentures as creations of their own.

[32] Considering decisions of the House of Lords in *J & F Stone Lighting & Radio Ltd v Haygarth* [1968] AC 157 and *Tyrrell, Re; Gardner, Re; Mascher, Re* [1938] 1 All ER 20, the High Court concluded that the nature of the technicians' work fell under the category of manual labour. Therefore, their employment within the premises was deemed as constituting a factory. Consequently, the appeal was dismissed based on this determination.

[33] In that case, it was held that meaning of 'manual labour' is not confined to unskilled manual labour, skilled manual labour is not exempted.

[34] Justice Lai Kew Chai J held at p 85 as follows:

> But what is 'manual labour' is a question of law and, in approaching the construction of the words in the Act, *it is neither helpful to be emotional nor permissible to allow ourselves to be a prisoner of the colloquial usage and meaning of the words 'manual labour'. Dr Kunaratnam's idea that manual labour connotes someone who uses a shovel is an example of a piece of colloquialism*. To hold that the dental technicians were employed in manual labour for the purposes of a piece of social legislation does not, in my view, detract from the skilfulness of the technicians. *The application of the Act is not limited to unskilled manual labour. Skilled manual labour is not exempted. As has been seen, in law, an engineering technician has been regarded as employed in manual labour*. (Emphasis added.)

[35] In *J & F Stone Lighting & Radio Ltd v Haygarth* [1968] AC 157, an engineer whose role consisted of diagnosing and repairing faults in television and radio sets was found to be engaged in manual labour.

[36] In that case, Lord Reid sitting in the House of Lords stated at p 170:

> I do not doubt that *manual labour is not limited to physical work of a strenuous character: a person who is engaged in repetitive work of a delicate character which merely requires manual dexterity may well be included. The real question is whether this phrase includes persons whose work is predominantly brain work — where 'the real labour involved is labour of the brain and the intelligence': per Warrington J in In re National Insurance Act 1911; In re Lithographic Artists, In re Engravers 1*. I cannot imagine a case in which this question could arise under the Factories Act if there were more than one or two persons working in the alleged factory. I agree with the Scottish decision in *Griffith v Ferrier 2* that it is sufficient to make premises a factory if only one person is employed there in manual labour, and if a number of persons are employed in the premises in making, repairing or adapting articles it is hardly possible that all of them should be predominantly engaged in brain work. (Emphasis added.)

[37] In that case, Lord Morris of Borth-Y-Gest stated at p 175:

> My Lords, *I cannot think that if someone spends all his time, or at least the greater part of it, doing work with his hands he is not to be regarded as employed in manual labour merely because he needs knowledge to do this work*. I can find nothing in the wording of the Act which suggests that if manual labour needs knowledge for its performance it is to cease to be regarded as manual labour. (Emphasis added.)

[38] The case of *Tyrrell, Re; Gardner, Re; Mascher, Re* [1938] 1 All ER 20 concerned the employment of modellers. The work of the modellers was to mould clay into ornaments and other objects according to their employer's instructions. They were given photographs and working drawings which they were to follow. The court held that they were not employed in artistic faculties. The substantial nature of their employment was by way of manual labour.

[39] In that case, Branson J stated at p 23:

> All that I think it is necessary to add to it — it is perhaps not in addition to the principle, but to the particular facts which have to be looked for — is that, *if one finds a man employed because he has the artistic faculties which will enable him to produce something wanted in the shape of a creation of his own, then obviously, although it involves a good deal of manual labour, he is employed in order that the employer may get the benefit of his creative faculty, and not because his employer wants a certain number of tons of stone removed by a sculptor's chisel from a block of marble or granite in his studio*. On the other hand, *if he is employed because he has the manual dexterity necessary to make him — to use an expression which I think Mr Maschek used — a suitable tool in the employer's hand to produce something which he has in his mind, and which he wants created, and which, if he had the manual dexterity and the time, he would create himself, then I think that the employee is properly regarded as being in the category of a manual labourer, and not as being employed otherwise than as a manual labourer*. I think that it would be very difficult and very dangerous to attempt to lay down any form which could be applied with any rigidity to any particular case. That can be seen at once when one thinks of the instances which were discussed in the argument of the case. Take a man who carves wood. The ordinary workman who puts a key pattern on to the backs of the chairs, or on to sideboards or other furniture, would, I suppose, be considered by everybody to be nothing more than a manual labourer, employed in manual work. But one can go from him, by infinite gradations, through more and more skilled people — whose manual dexterity, perhaps, may be greater, perhaps, may be no greater, but yet who bring more and more of the artistic sense into their productions — until one gets to the stage of a man like Grinling Gibbons, whom nobody would pretend to think came within the category of a manual labourer, and not an artist ...

[40] Thus, the issue whether the respondents were engaged by the appellant in 'manual labour' must be determined by looking at the nature of the substantial employment, and not to matters that are incidental and accessory.

[41] It is also relevant to consider whether the respondents were engaged by the appellant to utilise their expertise in the operations of these machineries to create something in the shape of the respondents' own creations or the respondents' own innovations, wanted by the appellant. If this not the case, the respondents were more probably engaged for the manual labour in the operations of these machineries.

[42] Thus, in *Yong & Son Construction Sdn Bhd v Thian Kim Fatt* [2017] MLJU 192, a crane operator was found to be engaged in manual labour.

[43] In *Bond Electrical (KL) Sdn Bhd v Abu Bakar bin Chik & Lain-Lain* [2002] 4 MLJ 139 electricians were found to be manual labourers.

[44] In *Federal Power Sdn Bhd v Vengataselam Chellappan* [2019] 1 LNS(O)

14 [CA] a machine operator was found to be engaged in manual labour.

[45] In *Syed Ibrahim bin Syed Mohd & Ors v Esso Production Malaysia Incorporated* [2004] 2 MLJ 49; [2014] MLRHU 1458, mechanical technician, production technician, electrical and instrument technician, crane operator and industrial health technician cum radio operator was found to be engaged in manual labour.

[46] In *Chareon Pokphand Jaya Farm (M) Sdn Bhd v Chung Lin* [2005] MLJU 680; [2006] 1 CLJ 784, an electrical chargeman was found not to be a manual labourer.

[47] In *Leighton Contractors (M) Sdn Bhd v Gnanapragasam a/l Arukiam & Ors* [2016] 11 MLJ 559, the question was whether a 'shunter/train assistant' was classified as 'engaged in manual labour'. The court held that although there was no evidence of the job description the nature of the work and the consideration of the duties when viewed as a whole, makes it clear that the general nature of the employment is physical in nature and therefore engaged in 'manual labour'.

[48] In *Abdul Razab bin Yahaya lwn Champsurf Sdn Bhd* [2023] 7 MLJ 891, a cook whose duties involved supervising junior cooks/chefs was held to be manual worker.

[49] In this case, operating both the articulated dump truck ('ADT') and excavator undoubtedly necessitated knowledge, understanding, and skill in manipulating the control systems of these machineries, involving continuous manual engagement of hands and legs. The tasks, akin to driving an ordinary car but more intricate, necessitated specialised training and perhaps required the possession of a license.

[50] The knowledge, understanding, and skill or expertise in handling the control systems of these machineries, while crucial, remains secondary to the core aspect of continuous manual labour — using hands and legs to operate these machineries. This manual dexterity does not primarily rely on highly scientific knowledge but emphasises practical skill and physical engagement. There are no innovation or creation of the operators of their own by using use of these machineries.

[51] Applying the tests or criteria established in the decided cases as mentioned, this court finds that the respondents engaged in 'manual labour' according to the definition in s 2(a) of the Schedule to the SLO, despite the skill required for operating or driving these machineries in their employment.

[52] That being the case, the Assistant Director of Labour has not committed any legal or factual error in this regard.

WHETHER THE RESPONDENTS ARE ELIGIBLE FOR OVERTIME PAY

[53] The respondents claimed for overtime on a normal day for a period of 12 months before their employments were terminated.

[54] The appellant's case is that the respondents were working according to a shift work schedule, which is unique to the mining and were provided with 'field breaks' under their employment contracts. Hence, they were not entitled to overtime pay.

[55] By their employment, the respondents have to work three days of day shift with 12 working hours from 6am to 6pm followed by three days of night shift with also 12 working hours from 6pm to 6am with one day off after the six days shift works.

[56] In addition, after completing 12 completed weeks (three months) of shift works, the respondent were given paid leave in the form of 'field break' of 14 days with additional two days to return to work (total 16 days).

[57] Appellant computed the daily working hours of the respondents based on three months (12 weeks) taking into account the number of off days, 'field break' ('FB') and additional two days for returning to works as follows:

(a) Total work hours for three months:

Work — 12 weeks x 6 days = 72 days

Field break — 2 weeks x 7 days + (addition 2 days round trip) = 16 days

One day work — 11 hours x 72 days = 792 hours one day FB — 11 hours x 16 days = 176 hours

(792–176) hours = 616 hours

(b) Work hours per month:

616hours/three months (work for 12 weeks = three months) = 205.333 hours (work 205.333 per month)

205.333/26 days = 7.89 hours per day

[58] The learned counsel for the appellant submitted that upon calculation, factoring in the 'field break,' the daily working hours amount to 7.89, which

doesn't surpass the prescribed 48 hours per week under the Sarawak Labour Ordinance. Consequently, they contend that no overtime payment is due to the respondents.

[59] However, s 105A of the SLO provides that:

> 105A(1) Shift work
>
> Notwithstanding paragraphs (b), (c) and (d) of subsection (1) of section 105, *but subject to paragraph (a) of subsection (1) of that section*, an employee who is engaged under his contract of service in shift work may be required by his employer to work more than eight hours in any one day or more than forty-eight hours in any one week *but the average number of hours worked over any period of three weeks*, or over any period exceeding three weeks as may be approved by the Director, *shall not exceed forty-eight hours per week*. (Emphasis added.)

[60] In other words, though s 105A(1) of the SLO allows for more than 48 hours in a week for shift work, but the average over any three week period should not exceed 48 hours per week.

[61] Based on their contract of employment, the respondents have to works 12 hours by shift either from 6am to 6pm or 6pm to 6am, that is 12 hours per day for six days a week and continue for 12 completed weeks before the 'field break' of 14 days plus two days.

[62] Based on the evidence of the respondents, they were given one hour break for every 12 hours shift of works per day. That means that their total working hours per day is 11 hours after deducting the one hour break.

[63] According to the computation conducted over a three week period as per s 105A(1) of the SLO, it seems that the respondent was engaged in working hours average 66 hours per week (11 hours per day). This exceeded the limit set by the section, which stipulates a maximum of 48 hours per week. The excess amount totalled 18 hours over the prescribed limit per week (that is three hours per day) ie total hours:

Working hours per day: 12 hours – one hour (break) = 11 hours

Working hours per week (six days) = 11 hours x six days = 66 hours

[64] In respect of the overtime, s 105(6) of SLO provides that:

> (6) For any *overtime work carried out in excess of the normal hours of work*, the employee shall be paid at a rate which is not less than one and a half times his hourly rate of pay irrespective of the basis on which his rate of pay is fixed.

[65] Section 2 defines 'normal hours of works' to mean 'the number of hours

of work, *not exceeding the limit prescribed in sub-s (1) of s 105*, as agreed between an employer and an employee in the contract of service to be the usual hours of work per day'.

[66] Section 2 defines 'overtime' to mean 'the number of hours of work carried out *in excess of the normal hours of work per day*, and includes, if any work is carried out after the spread over period of ten hours, the whole period beginning from the time that such spread over period ends up to the time that the employee ceases work for the day'.

[67] That being the case, the respondents has indeed been working overtime for the excess of three hours per day over the period of every three weeks, the normal working hours as prescribed by s 105A(1) being eight hours per day.

[68] The Senior Assistant Director Labour awarded the respondent overtime pay as follows:

Name	(a) Total working days from October 2021 to September 2022 (a)	(b) Total amount of overtime (x 3 hours) (b) (a) x 3 hours	(c) Overtime pay per hour (c)	Total overtime payable (RM) (b) x (c)
Gelinggas ak James Watt	214	642	19.20	12,454.80
Jacky ak Dunggat	220	660	19.40	12,604.00
Nelson Kudan ak Budin	236	708	20.27	14,351.16

[69] The learned counsel of the appellant is not submitting that the number of working days as utilised by the Senior Assistant Director of Labour for computation of the overtime pays are wrong or incorrect. There is no challenge on that.

[70] As to whether the one off-day per week and the 'field break' of 14 days plus two days (16 days) accorded to the respondent every 12 weeks can be taken into account in the determination whether the respondents have worked overtime, s 108 of the SLO provides that:

Unless the contract of service otherwise stipulates, and subject to the provisions of section 105, wages shall only be payable for days actually worked, for paid holidays, for days other than Sundays or other rest days on which through no fault of the employee no work is provided by the employer and for the time spent in attending before any court if such court certifies that his attendance was necessary for the ends of public justice.

[71] Section 2 of the SLO defines 'wages' as follows:

'wages' means 'basic wages and all other payments in cash payable to an employee for work done in respect of his contract of service but does not include —

(a) the value of any house accommodation or the supply of any food, fuel, light or water or medical attendance, or of any approved amenity or approved service;

(b) any contribution paid by the employer on his own account to any pension fund, provident fund, superannuation scheme, retrenchment, termination, lay-off or retirement scheme, thrift scheme, or any other fund or scheme established for the benefit or welfare of the employee;

(c) any travelling allowance or the value of any travelling concession

(d) any sum payable to the employee to defray special expenses entailed on him by the nature of his employment;

(e) any gratuity payable on discharge or retirement; or

(f) any annual bonus or any part of any annual bonus;

[72] Thus, wages encompass cash payments for work done but exclude non-monetary benefits such as house accommodation, food, fuel, light, water and medical allowances, employer contributions to various funds, travelling allowances, special expense reimbursements, gratuities, and annual bonuses.

[73] In the premises, wages of the respondents that the appellant agreed to pay are inclusive of all their entitlement to the paid one off day a week, 'field break' of 14 days plus two days (16 days) but excluding all those allowances and items excluded by the definition of 'wages' under s 2 of the SLO.

[74] Further s 111(1) of the SLO provides that:

111(1) Except where otherwise expressly permitted by this Ordinance, *the entire amount of wages earned by, or payable to, any worker in respect of any work done by him shall be actually paid to him in legal tender and every payment of, or on account of, any such wages made in any other form shall be illegal, null and void*. (Emphasis added.)

[75] That being the case, the overtime pay owed to the respondents constitutes wages that must be actually paid by the appellant in legal tender and

not to be paid or asserted to have been paid by one off day a week, 'field break' of 14 days plus two days (16 days) as contended by the appellant.

[76] These days in question are already factored into and regarded as part of wages under the category of 'paid holidays, excluding Sundays or other rest days' under s 108 of the SLO. Therefore, if the respondents are required or obligated to work on their off days during the week, the 'field break' of 14 days plus two days (16 days), they must be additionally compensated and paid for the work, as they have already earned entitlement by their wages.

[77] For the reasons given, despite the respondents being provided with one off-day per week and a 'field break' of 14 days plus two days, these allowances do not negate their entitlement to and from receiving overtime pay.

TERMINATION AND LAYOFF BENEFITS

[78] The Senior Assistant Director of Labour found that the appellant failed to conduct a proper or due inquiry, affording the respondents the opportunity to be heard in respect of the alleged misconducts inconsistent with the conditions of their employment made against the respondents, rendering the terminations invalid.

[79] Consequently, Senior Assistant Director of Labour held that the respondents were entitled to termination benefits under r 4(1) of the of the Labour (Termination And Lay-Off Benefits) (Sarawak) Rules 2008.

[80] Accordingly, the Senior Assistant Director of Labour awarded the respondents termination and layoff benefits under r 6(1) of the Labour (Termination And Lay-Off Benefits) (Sarawak) Rules 2008 pursuant to r 4(1) of the same Rules as follows:

Respondents	Period of employment	Duration of service	Number of days of entitlement	Amount of termination benefits
Gelinggas ak James Watt	17 May 2019 to 30 September 2022	3 years and 4 months	49 days	RM2,690 x 12/365 x 49 days = RM4,333.47

Jacky ak Dunggat	21 March 2021 to 30 September 2022	1 year and 6 months	15 days	RM2,690 x 12/365 x 15 days = RM1,326.57
Nelson Kudan ak Budin	6 November 2018 to 30 September 2022	3 years and 6 months	57 days	RM2,810.00 x 12/365 x 57 days = RM5,265.86

[81] In this appeal, the appellant did not also contest the Senior Assistant Director of Labour's computation of the termination benefits based on r 6 of the Labour (Termination and Lay-Off Benefits) (Sarawak) Rules 2008.

[82] The appellant's appeal and complaint is that the Senior Assistant Director of Labour has disregarded the evidence adduced by the appellant showing that the respondents have work performance and disciplinary issues which justified the appellant not to renew or terminate the employment contracts of the respondents.

[83] The learned counsel for the appellant contended that the Senior Assistant Director of Labour has erred in fact and in law to hold that a 'due inquiry' is mandatory in the light that the respondents have work performance and disciplinary issues and that the appellant has valid ground not to renew/terminate the respondents' employment contracts.

[84] The learned counsel for the appellant relied on the decision of the Supreme Court in *Dreamland Corp (M) Sdn Bhd v Chong Chin Sooi & Anor* [1988] 1 MLJ 111 and submitted that notwithstanding the appellant's failure to conduct an inquiry into the misconducts at the workplace of the respondents, it is still open to the appellant to justify its actions in the proceedings before the Senior Assistant Director of Labour (the Labour Court).

[85] The learned counsel for the appellant contended that based on the evidence on the work performance and disciplinary issues concerning the respondents, there is valid grounds for the appellant not to renew or to terminate the employment of the respondents.

A THE REQUIREMENT OF DUE INQUIRY

[86] Section 14(1) of the SLO (which is in *pari materia* to s 14(1) of the Employment Act 1955) provides that:

B 14 Termination of contract for special reasons

(1) An employer may, on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of his service, *after due inquiry* —

(a) dismiss without notice the employee;

C (b) downgrade the employee; or

(c) impose any other lesser punishment as he deems just and fit, and where a punishment of suspension without wages is imposed, it shall not exceed a period of two weeks. (Emphasis added.)

D

[87] The relevant parts of rr 3(1), 4(1)(b) and 6(1) of the Labour (Termination and Lay-Off Benefits) (Sarawak) Rules 2008 are also reproduce as follows:

E 3 General provisions for the entitlement of employees to termination or lay-off benefits payment

(1) Subject to these Rules, *an employer shall be liable to pay termination or lay-off benefits payment* calculated in accordance with rule 6 to an employee *who has been employed under a continuous contract of service for a period of not less than twelve months* ending with the relevant date if —

F (a) *the contract of service of the employee is terminated*; or

(b) the employee is laid-off within the meaning of rule 5.

...

G 4 Termination

(1) Subject to subrules (2), (3) and (4), an *employee shall be entitled to termination benefits payment* where his contract of service is terminated for any reason whatsoever *otherwise than* —

H (a) ...

(b) by the employer, on the grounds of misconduct inconsistent with the fulfillment of the express or implied conditions of his service, *after due inquiry* or

I (c) ...

6 Amount of termination or lay-off benefits payment

(1) Subject to the provisions of these Rules, the amount of termination or lay-off benefits payment to which an employee is entitled in any case shall not be less than —

(a) ten days' wages for every year of employment under a continuous contract of service with the employer if he has been employed by that employer for a period of less than two years; or

(b) fifteen days' wages for every year of employment under a continuous contract of service with the employer if he has been employed by that employer for two years or more but less than five years; or

(c) twenty days' wages for every year of employment under a continuous contract of service with the employer if he has been employed by that employer for five years or more,

and prorata in respect of an incomplete year, calculated to the nearest month.

[88] To entitle the appellant to terminate the employment contracts of the respondents on the grounds of their misconduct inconsistent with the fulfillment of the express or implied conditions of his service as asserted by the appellant, s 14(1) of the SLO confers upon the respondent a statutory right to undergo a 'due inquiry' conducted by the appellant before any dismissal.

[89] The requirement of a 'due inquiry' includes the right of respondents as employees, not only to a fair hearing and an opportunity to answer the charges brought against them, but also the right to make representations in mitigation of any punishments that are proposed by the domestic inquiry tribunal.

See: *Said Dharmalingam bin Abdullah (formerly known as Dharmalingam a/l Ranganathan) v Malayan Breweries (Malaya) Sdn Bhd* [1997] 1 MLJ 352 (SC) and *Yeo Hiap Seng Trading Sdn Bhd v Lim Lee Choon* [2004] 1 CLJ 634.

[90] There is no inquiry at all, let alone 'due inquiry' held by the appellant in this case in respect of the alleged misconducts justifying the termination of the employment contracts of the respondents. The lack of 'due inquiry' rendered the appellant liable to pay the respondents the termination benefits under s 14(1) of the SLO.

[91] Therefore, given the absence of a 'due inquiry', the Senior Assistant Director of Labour did not err in law or fact in granting the respondents the termination benefits pursuant to r 4(1)(b) of the SLO and calculated according to r 6(1) thereof.

[92] Regarding the submission put forth by the learned counsel for the appellant, who contends that the absence of a 'due inquiry' is not fatal, relying on the decision in *Dreamland Corp (M) Sdn Bhd v Chong Chin Sooi & Anor* [1988] 1 MLJ 111, and contended that the Senior Assistant Director of Labour should not disregard the evidence presented by the appellant, the essence of the submission is that, despite the lack of a 'due inquiry,' the Senior Assistant

A Director of Labour should still examine the evidence and to determine whether the appellant committed 'misconduct inconsistent with the fulfillment of the express or implied conditions of his service' before compelling the appellant to pay the respondents with termination benefits.

B ANALYSIS AND FINDINGS

Gelinggas ak James Watt — The first respondent

C **[93]** The evidence presented by DW2 in her witness statement for the appellant before the Senior Assistant Director of Labour indicated that the first respondent commenced employment on 15 May 2019 as an ADT operator, initially for a year until 14 May 2020.

D **[94]** The record reflects issues with the first respondent's compliance with supervisor instructions noted in a site staff probation review form on 15 May 2019 (p 19, record of appeal). Additionally, the appellant issued letters highlighting unsatisfactory work performance and probation period extensions on 27 July 2019 and 30 April 2020 (pp 16–17, record of appeal).

E **[95]** There is a letter dated 27 July 2019 of the appellant issued to the first respondent (at p 16 of the record of appeal) whereby the appellant informed the first respondent of his unsatisfactory work performance and the extension of the probation period to 10 November 2019.

F **[96]** There is a warning letter dated 30 April 2020 of the appellant issued to the first respondent (at p 17 of the record of appeal) in respect of the first defendant's absence from work and going out to work without permission during MCO with warning of disciplinary action for recurring behaviours.

G **[97]** The appellant's letter dated 2 May 2020 (at p 50 of the supplementary record of appeal) shows that the duration of the employment contract of the first respondent was indeed extended to 14 May 2021.

H **[98]** Further, despite these concerns, the appellant signed with the first respondent an employment contract dated 8 March 2021 (Ref: SDM/HRD/21/0065/MC) extended employment till 28 February 2022 with a three month probation period and specified a monthly salary of RM3,190.

I (Pages 42–49, supplementary record of appeal).

[99] Following instances of first respondent's absence from work in January and June 2022, the appellant issued warnings and imposed probation periods upon the first respondent.

(See pp 18–19 of the record of appeal).

[100] Even after the supposed employment contract end on 28 February 2022, the appellant continued to engage the first respondent and penalised him for absence from work without notice, suspending them without pay until 3 July 2022 (p 20, record of appeal).

(See p 20 of the record of appeal).

[101] The letter dated 30 August 2022 (at p 51 of the record of appeal), stating the non-extension of the contract, effectively served as a termination notice of the employment contract of the first respondent on 30 September 2022.

[102] This action, considering the continued engagement and disciplinary measures essentially extended the contract, leaving no doubt of the appellant's decision to terminate rather than simply not renew the employment contract of the first respondent.

Jacky ak Dunggat — The second respondent

[103] In respect of Jacky ak Dunggat, the second respondent, DW2's evidence is that he first joined the company on 21 March 2021 as an ADT operator.

[104] After about three months, by a letter dated 4 June 2021 of the appellant issued to the second respondent (p 71 of the supplementary record of appeal), the appellant informed that the second defendant has satisfactorily completed the probationary period and the second respondent's position and employment as ADT operator with the appellant was confirmed effective on 18 June 2021.

[105] The evidence also shows that the appellant and the second respondent also signed the Employment Contract (Ref: SDM/HRD/21/0204/MC) on 19 June 2021 (at pp 62–69 of the supplementary record of appeal) whereby the appellant hired the second respondent as its ADT operator for 12 months until 18 June 2022 at a monthly salary of RM3,190. Incongruously, there was a probation period of three months imposed.

[106] There was a letter dated 14 May 2022 issued by the appellant to the second respondent (at p 21 of the record of appeal) regarding the absence of the

second respondent from work on 8, 9 and 13 of May 2022 whereby the second respondent was given a third warning of any repeated future recurrence of the incidents and in addition the second respondent was suspended from work also for 14 days until 28 May 2022 without pay. A 'six months good behaviour probation period' was also imposed. Thus, the second respondent was in effect punished for his indiscipline, if at all for being absence from work without permission.

[107] Similarly, after 18 June 2022 (the end of the second respondent's employment contract period), the appellant continued to hire and the first respondent continued to work for the appellant as ADT operator for unspecified period.

[108] By a letter dated 30 August 2022, the appellant also similarly informed the second respondent that the appellant 'will not be extending' his contract of service and that the second respondent's employment would end on 30 September 2022.

Nelson Kudan ak Budin — The third respondent

[109] In respect of Nelson Kudan ak Budin, the third respondent, DW2 testified that the third respondent first joined the appellant on 6 August 2018 working as excavator operator.

[110] The third respondent was issued with a letter dated 3 June 2019 (at p 31 of the record of appeal) to show reasons for his absence for works for several days. There is no evidence as to what happened after that.

[111] There is letter issued by the appellant to the third respondent sometime in August 2019 (pp 22–30 of the record of appealed) whereby he was investigated for negligently causing damage to the property of the appellant on 8 November 2018 and 25 April 2019. He was then suspended for seven days from work without pay.

[112] In the same year, the third respondent was also issued with a letter dated 4 December 2019 (at p 32 of the record of appeal) by the appellant to show cause on failing the alcohol tests on 4 December 2019.

[113] By a letter dated 9 December 2019 issued by the appellant to the third respondent (at p 33 of the record of appeal), the third respondent was suspended from work without pay for one week until 16 December 2019 for his conduct seemingly relating to his alleged consumption of alcohol.

[114] Then in 2020, by a letter undated issued by the appellant to the third respondent (at p 34 of the record of appeal), the appellant again suspended the third respondent from work without pay for a week until 12 July 2020 pending investigation on incident of property damage. The third respondent was requested to attended a domestic inquiry on 12 July 2020 to determine the status of his employment with the appellant.

[115] Following the domestic inquiry and by a letter dated 13 July 2020 issued by the appellant to the third respondent, the third respondent was informed that he was not allowed to operate PA truck for two weeks, has to work eight hours daily with no overtime entitlement and he was informed to cooperate and comply with HSSE practices of the appellant relating to drug and alcohol tests and to abide by the rules and regulations in his employment contract.

[116] By a letter dated 4 June 2021 issued by the appellant to the third respondent (at p 37 of the record of appeal), the second respondent's probation period was extended for one month ending 15 June 2021.

[117] Notwithstanding all these alleged past misconducts of the third respondent, the appellant signed the employment contract (Ref: SDM/HRD/21/0135/MC) signed between the appellant with the third respondent on 10 June 2021 (at pp 83–87) by which the appellant hired the third defendant as EXC 349 operator for a duration of 12 months ending on 9 June 2022 with a monthly salary of RM3,310. A probation period of three months was also imposed.

[118] Following that, by a letter dated 20 January 2022 issued by the appellant to the third respondent (at p 38 of the record of appeal), the third respondent was given second warning for his absence from work on 19 January 2022.

[119] Thereafter, there was another letter dated 24 May 2022 issued by the appellant to the third respondent (at p 39 of the record of appeal) whereby the third respondent was given a third warning for his absence from work on 19 May 2022 and 23 May 2022 and in addition he was suspended from work without pay for two weeks ending on 7 June 2022.

[120] Similar, after his employment contract supposedly ended on 9 June 2022, it seems that the appellant continued to hire and the first respondent continued to work for the appellant as the excavator operator until by a similar letter dated 30 August 2022 of the appellant, the appellant informed the third respondent that the third respondent's employment contract was not renewed and that his employment would end on 30 September 2022.

[121] Examining the sequence of events involving all three respondents, it becomes evident that the performance and disciplinary issues identified by the appellant as grounds for terminating their employment mainly revolve around absenteeism as a form of misconduct. Notably, the appellant had already punished and penalised all three respondents by suspending them from work without pay.

[122] Consequently, subjecting them to termination of their employment contracts for the same misconducts again as alleged without affording them an opportunity to be heard and defend themselves would constitute an unfair and double punishment.

[123] Further, in *Dreamland Corp (M) Sdn Bhd v Chong Chin Sooi & Anor* [1988] 1 MLJ 111 (SC), it was held that the function of the Industrial Court upon a reference under s 20(3) of the Industrial Relations Act 1967 is to determine whether the misconduct as alleged against the employee by the employer is established and whether such misconduct if established constitutes just cause or excuse for the dismissal of the employee.

[124] The Supreme Court held that the Industrial Court should not find the dismissal of an employee by the employer without just cause or excuse and made the award purely for failure on the part of an employer to hold a domestic inquiry. It was held that the Industrial Court has to go on with the inquiry to determine whether there was any such misconduct on the part of the employee and whether it constituted just cause or excuse for the employer to dismiss the employee. Thus, it was held that initial breach of natural justice at the domestic inquiry stage can be cured by an Industrial Court inquiry.

See also: *Wong Yuen Hock v Sykt Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753 (FC).

[125] However, the employees' claims in *Dreamland Corp (M) Sdn Bhd v Chong Chin Sooi & Anor* [1988] 1 MLJ 111 (SC) and also in *Wong Yuen Hock v Sykt Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753 (FC) were for reinstatement to the former employment and back wages.

[126] In the instant case, the respondents are not pursuing reinstatement or restoration to their former employment by lodging their claim to Director of Labour under the SLO.

[127] Under the first proviso to s 8A of the SLO, the power of the Director of Labour is limited to issuing orders against an employer for 'payment of

indemnity in lieu of notice and other entitlements due to the employee as if no misconduct was committed'. There is no question of reinstatement of employment and back wages.

[128] The respondents in this case are seeking termination benefits against the appellant before the Director of Labour, claiming entitlement under r 4(1)(b) of the Labour (Termination and Lay-Off Benefits) (Sarawak) Rules 2008. The claims arise from the appellant's termination of the respondents' employment allegedly for misconduct without conducting a 'due inquiry'.

[129] The legal principles established in *Dreamland Corp (M) Sdn Bhd v Chong Chin Sooi & Anor* [1988] 1 MLJ 111 (also in *Wong Yuen Hock v Sykt Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753 (FC)), which the appellant's counsel relied on by analogy, can have no application in view of the nature of respondents' claims brought before the Director of Labour against the appellant.

PRONOUNCEMENT AND ORDERS

[130] For the reasons as given, the appellant's appeal fails which this court hereby dismisses.

[131] After hearing submissions of the parties, this court orders the appellant to pay the first respondent, costs of the appeal in the sum of RM2,000 subject to and with allocatur fees.

[132] This court further orders the appellant to pay the second respondent, costs of the appeal in the sum of RM800 subject to and with allocatur fee.

[133] Finally, this court makes no order as to costs as between the appellant and the third respondent who has not attended to the appeal.

Appeal dismissed with costs of RM2,000 and RM800 to first respondent and second respondent respectively subject to and with allocatur fees and no order as to costs to third respondent who had not attended to the appeal.

Reported by Dzulqarnain Ab Fatar